Supreme Court, U. S.
FILED
OCT 25 1978
MICHAEL RODAK, JR., CLERK

No. 78-318

In the Supreme Court of the United States

OCTOBER TERM, 1978

DALLAS POWER & LIGHT COMPANY, ET AL.,
PETITIONERS

v.

CENTRAL POWER & LIGHT COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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Petitioners, electric utility companies that are subsidiaries of the Texas Utilities Company, contend that the court of appeals erred in remanding for clarification an order of the Federal Power Commission holding that it lacked jurisdiction over petitioners.

1. Prior to May 4, 1976, petitioners and other electric utilities, including Central Power & Light Company (CP&L) and the Southern Division of West Texas Utilities Company (WTU), formed an inter-

connected power pool operating only within the State of Texas, called the Electric Reliability Council of Texas (ERCOT) (Pet. App. A-3, C-15). Under the agreement forming ERCOT and other individual agreements between ERCOT-member utilities, those utilities covenanted not to operate in interstate commerce or to interconnect with utilities that did (Pet. App. A-3, C-5). Nevertheless, on May 4, 1976, WTU's Southern Division began transmitting electric energy in interstate commerce to the Public Service Company of Oklahoma (PSO), a WTU affiliate operating in Oklahoma (Pet. App. A-3, C-5, C-14 to C-15). (WTU, PSO, and CP&L are all operating subsidiaries of the Central and South West Corporation (CSW).) This action temporarily placed all electric utilities interconnected with WTU, including petitioners, in interstate commerce. Later on May 4, 1976, after 10 hours of the interstate transmission, petitioners and the Houston Lighting and Power Company (HL&P), another member of ERCOT, disconnected themselves from WTU and its affiliates (Pet. App. C-3; C-15 to C-16). The result was to bifurcate ERCOT's operations into interstate and intrastate divisions.

Meanwhile, also on May 4, 1976, WTU's parent company, CSW, petitioned the Federal Power Commission to "[c]onduct such investigations and issue such orders as are necessary and proper" under Section 202(a) and (b) of the Federal Power Act, 16 U.S.C. 824a(a) and (b), to maintain the interstate connection between CSW and ERCOT and to promote and encourage the interconnection of ERCOT

with the Southwest Power Pool, an interstate power pool of which PSO is a member (Pet. App. C-2). On May 13, 1976, CSW further petitioned the Federal Power Commission for an order requiring the emergency reconnection of ERCOT and CSW pursuant to Section 202(c) of the Act, 16 U.S.C. 824a(c) (Pet. App. C-3).

On July 21, 1976, the FPC issued its "Order Rejecting in Part and Accepting in Part Application for Action Pursuant to Section 202" (Pet. App. C-1 to C-25). The Commission held that, by virtue of the events of May 4, 1976, WTU and CP&L were "public utilities" subject to the Commission's jurisdiction under Section 201(e) of the Act, 16 U.S.C. 824(e). However, relying on a memorandum by its General Counsel (Pet. App. C-15 to C-17), the Commission held that petitioners and HL&P had not become "public utilities," despite the temporary interstate connection, and that it therefore lacked jurisdiction to grant the relief requested by CSW under Section 202(b) (Pet. App. C-8, C-12). The Commission also refused to order an emergency interconnection of ERCOT and CSW pursuant to Section 202(c) of the Act (Pet. App. C-8). The Commission did, however, order further investigation under Section 202(a) and a temporary interconnection between ERCOT and CSW affiliates under the emergency provisions of Section 202(d), 16 U.S.C. 824a(d), which it held would not make petitioners "public utilities" subject to the Commission's jurisdiction (Pet. App. C-8 to C-12).

On review, the court of appeals remanded the case for clarification of the Commission's rationale. The court held that neither the Commission's order nor the General Counsel's memorandum on which it relied adequately explicated the basis of the decision. Specifically, the court was unable to discern whether the FPC's determination that petitioners were not subject to its jurisdiction rested on a conclusion of law or an exercise of discretion (Pet. App. A-3 to A-5). The court further noted that if jurisdiction had been declined as a matter of discretion on the basis that the interstate transmission constituted a breach of the ERCOT contracts, the FPC had failed to consider arguments that the contracts violated the antitrust laws (Pet. App. A-3 to A-4).

2. Petitioners assert that the court of appeals should have decided the jurisdictional question of whether they are "public utilities" under the Federal Power Act. However, the Commission agrees with the court of appeals that it should reexamine this case. The court of appeals did not, as petitioners claim, delegate to the Commission the court's ultimate responsibility to adjudicate the question of the agency's jurisdiction. The court sought a clarification of the FPC's rationale in declining jurisdiction so that it could properly review the agency's initial determination of the issue. See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647-648 (1972). Indeed, while petitioners now assert (Pet. 10-11) that the FPC order found no jurisdiction as a matter of law,

petitioners' brief in the court of appeals,[1] as well as the cases cited in the General Counsel's memorandum,[2] suggest that the FPC exercised its discretion in concluding that petitioners were not "public utilities." In the absence of a discernible administrative rationale based on an adequate record, the court of appeals appropriately remanded for clarification. See, *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196-197 (1947). This is not a case like *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), where a court of appeals unduly interfered with agency procedures and with decisions made following extensive administrative hearings.

Moreover, in view of the Commission's acquiescence in the remand, review by this Court at this time appears unwarranted. After the Commission has considered the factors bearing on the jurisdictional issue and has made its position clear, aggrieved parties will be able to obtain effective judicial review.

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[1] Brief for Intervenors at 14-15, 28, *Central Power & Light Co.* v. *Federal Energy Regulatory Commission*, 575 F.2d 937 (D.C. Cir. 1978).

[2] *E.g.*, *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515, 536 (1945) ("Congress appears to have left to the Commission's sound administrative discretion to determine whether or not to assert its authority in such situations"), cited at Pet. App. C-17.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 270254 182